UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In the Matter of:	)	
	)	
Shook & Fletcher Insulation Co.,	)	Case No. 02-02771-BGC-11
	)	
Debtor.	)	

ORDER APPROVING DISCLOSURE STATEMENT

I. Background

The matters before the Court are:

1. Consideration of the debtor's Disclosure Statement;

2. An Objection to Disclosure Statement Relating to Debtor's Plan and Objection to Confirmation of Plan (Proceeding No. 228) filed on July 19, 2002, by National Union Fire Insurance Co.;

3. The Objections of St. Paul and Marine Insurance Company to Approval of Debtor's Disclosure Statement, to Approval of Debtor's Pre-Petition Solicitation, and to Confirmation of Debtor's Plan of Reorganization (Proceeding No. 229) filed on July 19, 2002;

4. Ranger Insurance Company's Objection to Disclosure Statement and Confirmation of Debtor's Prepackaged Plan of Reorganization (Proceeding No. 230A) filed on July 19, 2002.[1]

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[1]Ranger did not participate in the hearing or otherwise prosecute its objection. In that context, the debtor asked the Court to dismiss Ranger's objection for want of prosecution. This Court does not believe that is appropriate. Ranger is entitled to a ruling on its motion.

In McKelvey v. AT & T Technologies, Inc., 789 F.2d 1518 (11th Cir. 1986) the per curiam opinion of the Court of Appeals for the Eleventh Circuit explained:

> The decision to dismiss for want of prosecution lies within the trial court's discretion and can be reversed only for an abuse of discretion. Martin-Trigona v. Morris, 627 F.2d 680, 682 (5th Cir.1980). However, the severe sanction of dismissal--with prejudice or the equivalent thereof--should be imposed "only in the face of a clear record of delay or contumacious conduct by the plaintiff." Martin-Trigona, 627 F.2d at 682. Moreover, such dismissal is a sanction of last resort, applicable only in extreme circumstances, and generally proper only

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Clerk, U.S. Bankruptcy Court
Northern District of Alabama
By: _____

5. A Confidential Revised and Amended Objection to Disclosure Statement Relating to Debtor's Plan and Objection to Confirmation of Plan (Proceeding No. 235) filed on July 29, 2002, by National Union Fire Insurance Co.;

6. A Motion to Approve Supplemental Notice Procedures (Proceeding No. 260) filed on August 30, 2002; and

7. A Motion Pursuant to Bankruptcy Rule 3019 for a Determination That Proposed Modifications to the Plan Do Not Adversely Change the Treatment of Any Claim or Interest (Proceeding No. 258) filed on August 30, 2002, by the Debtor.

After notice, a hearing was held on September 10, 2002. Appearing were: Richard Wyron, Richard Carmody, Roger Frankel and Joel Ruderman for the debtor; Jayna Lamar and Jim Goyer for St. Paul Fire & Marine; Scott Williams, the futures representative; Robert Fishman, the attorney for Scott Williams; Eric Ray and Richard Douglas for Travelers Casualty & Surety Company; Robert Rubin and Derek Meek for Hasbrouck Haynes; Hasbrouck Haynes; Michael Davis and Clark Hammond for National Union; David Anderson and Nancy Davis for the Asbestos Claimants Committee; and Donald Wright for Shook & Fletcher Supply Co.

II. Contentions

The parties' contentions are contained in their Joint Pretrial Statement for the Hearing on the Debtor's Disclosure Statement filed September 6, 2002.

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where less drastic sanctions are unavailable. Searock v. Stripling, 736 F.2d 650, 653 (11th Cir.1984); E.E.O.C. v. Troy State University, 693 F.2d 1353, 1354, 1358 (11th Cir.1982), cert. denied, 463 U.S. 1207, 103 S.Ct. 3538, 77 L.Ed.2d 1388 (1983). A finding of such extreme circumstances necessary to support the sanction of dismissal must, at a minimum, be based on evidence of willful delay; simple negligence does not warrant dismissal. Searock v. Stripling, 736 F.2d at 653; E.E.O.C. v. Troy State University, 693 F.2d 1353 at 1354, 1357.

Id. at 1520.

Ranger's choice not to present evidence or participate in the arguments is not, "a clear record of delay or contumacious conduct." And the Court will not treat it as such; however, because Ranger's objections are essentially the same as ones prosecuted by National Union, the Court is comfortable in considering them without additional information.

III. Issues and the Adequacy of the Disclosure Statement

The primary issue before the Court is whether to approve the disclosure statement proposed by the debtor.[2] The practical issue is whether that statement offers "adequate information" as defined by section 1125 of the Bankruptcy Code.[3] In deciding those issues, this Court has applied both subjective and objective factors.[4]

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[2]Of those interested parties actually participating in the hearing, all but National Union supported approval of the disclosure statement.

[3]The pertinent parts of section 1125 read:

(a) In this section -

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan; and

...

(b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

11 U.S.C. § 1125.

[4]The debtor's plan of reorganization is a "prepackaged" plan. But it is of course subject to the same factors as "traditional" cases. The bankruptcy court in In re Pioneer Finance Corp., 246 B.R. 626 (Bankr. D. Nev. 2000) explains:

> In a conventional Chapter 11 case, the debtor files a bankruptcy petition, then negotiates a reorganization plan and solicits votes after a disclosure statement has been approved.
>
> With a "prepackaged" plan, however, which is authorized under 11 U.S.C. § 1126(b), a plan proponent has negotiated a plan and solicited votes prior to the filing of a Chapter 11 petition and before there is a hearing to determine the adequacy of the disclosure. With prepackaged plans, the adequacy of the disclosure is evaluated under "applicable nonbankruptcy law, rule or regulation" or, if there is none, under the "adequate information" standard set forth in § 1125(a)(1). In a "prenegotiated" plan, the details of a plan are negotiated prior to the filing of the petition. Solicitation, however, does not occur until after the filing.

A. Subjective Factors

In In Matter of Texas Extrusion Corp., 844 F.2d 1142 (5th Cir. 1988), cert. denied sub nom. Texas Extrusion Corp. v. Lockheed Corp., 488 U.S. 926 (1988), the Court of Appeals for the Fifth Circuit offered subjective criteria that courts should apply to determine whether to approve a Chapter 11 disclosure statement. Writing for the court, Circuit Judge Jerre S. Williams stated:

> 11 U.S.C. § 1125 requires that prior to the solicitation of an acceptance or rejection of a plan of reorganization from a creditor, the creditor must receive a copy of the plan, or a summary of the plan, and a written disclosure statement. The disclosure statement must be approved after notice and a hearing, by the bankruptcy court as containing adequate information. "Adequate information" is defined in 11 U.S.C. § 1125(a) as being "information of a kind, and in sufficient detail, ... that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan."
>
> Appellants assert that "adequate information" was not contained in the Disclosure Statement sent to their creditors. We disagree. The determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court. In re Brandon Mill Farms, Ltd., 37 B.R. 190 (Bankr. N.D.Ga.1984); In re Stanley Hotel, Inc., 13 B.R. 926 (Bankr.D.Co.1981). We find no abuse of discretion in the bankruptcy court's approval of the Disclosure Statement.

Id. at 1157.[5]

Id. at 629-30 (footnote omitted).

[5]The bankruptcy court in In re Brandon Mill Farms, Ltd., 37 B.R. 190 (Bankr. N.D. Ga. 1984) offers:

> Bankruptcy Code § 1125(b) provides that a proposed disclosure statement may be approved by the Court, after notice and a hearing, upon determination by the Court that the disclosure statement contains adequate information. "Adequate information" is defined in § 1125(a)(1) of the Bankruptcy Code. Beyond the statutory guidelines described in the definition of "adequate information", the decision to approve or reject a disclosure statement is within the discretion of the Bankruptcy Court. In re Stanley Hotel, Inc., 13 B.R. 926, 930 (Bkrtcy.D. Colo.1981). The Bankruptcy Court shall review proposed disclosure statements on a case by case basis. Id. Bankruptcy law shall govern the Court's determination in this regard. Id.; 11 U.S.C. § 1125(d).

Id. at 191-92.

This Court agrees with the above but recognizes that the argument could be made that in the complex world of bankruptcy related asbestos litigation, preparing any statement that would allow, "a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment," may not be possible. Again, the Court of Appeals for the Fifth Circuit offers pertinent advice. Writing for the court in Matter of Cajun Elec. Power Co-op., Inc., 150 F.3d 503 (5th Cir. 1998), cert. denied sub nom. Mabey v. Southwestern Elec. Power Co., 526 U.S. 1144 (1999), Circuit Judge Carolyn D. King stated:

> The legislative history of § 1125 indicates that, in determining what constitutes "adequate information" with respect to a particular disclosure statement, "[b]oth the kind and form of information are left essentially to the judicial discretion of the court" and that "[t]he information required will necessarily be governed by the circumstances of the case." S.REP. NO. 95-989, at 121 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5907; see also Texas Extrusion Corp. v. Lockheed Corp. (In re Texas Extrusion Corp.), 844 F.2d 1142, 1157 (5th Cir.1988) ("The determination of what is adequate information is subjective and made on a case by case basis. This determination is largely within the discretion of the bankruptcy court."), vacated on other grounds, Adams v. First Fin. Dev. Corp. (In re First Fin. Dev. Corp.), 960 F.2d 23 (5th Cir.1992).

Id. at 518.

In applying the above subjective factors, this Court finds that the disclosure statement before this Court contains, as required by section 1125 of the Bankruptcy Code, "information of a kind, and in sufficient detail... that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan."

Similarly, based on the above, the Court finds that the information provided in the debtor's disclosure statement, governed by the circumstances of this case and within the discretion of this Court, is adequate to enable creditors to make informed decisions about the plan. As such, the statement should be approved.

B. Objective Factors

The bankruptcy court in In re A.C. Williams Co., 25 B.R. 173 (Bankr. N.D. Ohio, 1982) offers these objective factors for determining the adequacy of a disclosure statement. The pertinent part of the court's opinion reads:

> In determining the adequacy of a disclosure statement, the Court finds that there are certain criteria which should be set forth in the statement. They are: 1) the incidents which led to the filing of the Chapter 11; 2) a

> description of available assets and their value; 3) the anticipated future of the company; 4) the source of information for the disclosure statement; 5) disclaimer; 6) present condition of the company while in Chapter 11; 7) claims scheduled; 8) the estimated return to the creditors if liquidated; 9) the accounting process used and the identity of the person who furnished the information; 10) future management of the debtor; 11) plan. The Court found all these criteria have been met. The Court found that each of these items has been set forth in the disclosure statement.

Id. at 176.[6]

This Court agrees with the above factors. And in applying them here, finds that each of these factors is not only discussed in the disclosure statement, but is explained sufficiently to provide adequate information to enable creditors to make informed decisions about the plan.

At a minimum, each factor is discussed in the disclosure statement as listed below. There may be other locations.

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[6]The bankruptcy court in In re Metrocraft Pub. Services, Inc., 39 B.R. 567 (Bankr. N.D. Ga. 1984) added other factors from other reported cases and developed an additional list. It reads:

> Relevant factors for evaluating the adequacy of a disclosure statement may include: (1) the events which led to the filing of a bankruptcy petition; (2) a description of the available assets and their value; (3) the anticipated future of the company; (4) the source of information stated in the disclosure statement; (5) a disclaimer; (6) the present condition of the debtor while in Chapter 11; (7) the scheduled claims; (8) the estimated return to creditors under a Chapter 7 liquidation; (9) the accounting method utilized to produce financial information and the name of the accountants responsible for such information; (10) the future management of the debtor; (11) the Chapter 11 plan or a summary thereof; (12) the estimated administrative expenses, including attorneys' and accountants' fees; (13) the collectibility of accounts receivable; (14) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan; (15) information relevant to the risks posed to creditors under the plan; (16) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers; (17) litigation likely to arise in a nonbankruptcy context; (18) tax attributes of the debtor; and (19) the relationship of the debtor with affiliates.

Id. at 568. See also In re Microwave Products of America, Inc., 100 B.R. 376 (Bankr. W.D. Tenn. 1989) for a discussion of other courts' suggestions.

1. Incidents which led to the filing of the Chapter 11 – Article 2 (General Information), Page 7.

2. Description of available assets and their value – Article 13 (Financial Information), Page 57; Exhibit E.

3. Anticipated future of the company – Introduction, Page ii; Article 4 (The Company), Page 20; Article 9 (Risks of the Plan), Page 53; Article 11 (Alternatives to Confirmation), Page 54; Article 13 (Financial Information), Page 57; Exhibit D (Financial Projections);

4. Source of information for the disclosure statement – Introduction, Page ii; Article 3 (The Pre-Petition Process), Page 11; Article 14 (Sources of Information), Page 58.

5. Disclaimer – Introduction, Page i.

6. Condition of the company while in Chapter 11 – Introduction, Page ii; Article 4 (The Company), Page 20.

7. Claims schedule – Article 6 (Summary of the Plan), Page 26.

8. Estimated return to the creditors if liquidated – Article 11 (Alternatives to Confirmation), Page 54; Exhibit C.

9. Accounting process used and the identity of the person who furnished the information – Article 14 (Sources of Information and the Accounting Method Used), Page 58.

10. Future management of the debtor – Article 4 (The Company), Page 20.

11. The Plan – Article 6 (Summary of the Plan), Page 26; Exhibit B.

Based on the above, the Court finds that the information provided in the debtor's disclosure statement is adequate to enable creditors to make informed decisions about the plan.

IV. Conclusion

Based on the facts and in consideration of the subjective and objective factors discussed above, the Court finds that the debtor's disclosure statement contains

adequate information, as that term is defined in section 1125(a)(1) of the Bankruptcy Code, and should be approved.[7]

V. Order

Consequently, based on the above, the arguments of counsel, and the pleadings, it is **ORDERED, ADJUDGED and DECREED** that:

1. The debtor's Disclosure Statement is **APPROVED**;

2. The Objection to Disclosure Statement Relating to Debtor's Plan and Objection to Confirmation of Plan (Proceeding No. 228) filed by National Union Fire Insurance Co. is **OVERRULED**;

3. The Confidential Revised and Amended Objection to Disclosure Statement Relating to Debtor's Plan and Objection to Confirmation of Plan (Proceeding No. 235) filed by National Union Fire Insurance Co. is **OVERRULED**;

4. The Ranger Insurance Company's Objection to Disclosure Statement and Confirmation of Debtor's Prepackaged Plan of Reorganization (Proceeding No. 230A) is **OVERRULED**;

5. Based on the parties' representations that the Objections of St. Paul and Marine Insurance Company to Approval of Debtor's Disclosure Statement, to Approval of Debtor's Pre-Petition Solicitation, and to Confirmation of Debtor's Plan of Reorganization (Proceeding No. 229) are resolved, the Court considers that pleading **WITHDRAWN**;

6. The Motion to Approve Supplemental Notice Procedures (Proceeding No. 260) will be granted by a separate order submitted by Mr. Wyron; and

7. The Motion Pursuant to Bankruptcy Rule 3019 for a Determination That Proposed Modifications to the Plan Do Not Adversely Change the Treatment of Any Claim or Interest (Proceeding No. 258) will be granted by a separate order submitted by Mr. Wyron.

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[7]The parties raised other issues such as the standing of certain parties to object to the statement and whether the statement and plan were proposed in good faith. The Court need not address any additional arguments here. The disclosure statement satisfies the requirements of the Bankruptcy Code. If other issues are raised later in this case, (and they are relevant), the Court may address them then.

DONE this the 11th day of September, 2002.

BENJAMIN COHEN
United States Bankruptcy Judge

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